

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch**

**L/A Party Store,**

**Appellant,**

**v.**

**Case Number: C0204633**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against L/A Party Store (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on March 20, 2018.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

**CASE CHRONOLOGY**

By letter dated February 20, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in April 2017 through September 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated March 2, 2018, that did not request or include documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated March 20, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated March 30, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Counsel submitted a Freedom of Information Act (FOIA) request on May 8, 2018, and the Agency responded to this request by correspondence dated June 7, 2017, that was received by counsel on June 8, 2018. Subsequent correspondence dated June 28, 2018, was received.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states: "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of April 2017 through September 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Permanent disqualification is arbitrary and capricious and invalid because there is no justification in fact that the firm has engaged in trafficking. Nothing in the charge letter shows any evidence of trafficking based on the SNAP regulations definition. The listed transactions alone do not constitute trafficking. Nothing in the charge letter even suggests why multiple transactions or large purchase transactions are “unusual, irregular, and inexplicable activity”;
- The burden of proof should not rest with the store owners, but with FNS. Neither the charge letter, nor any law or regulation puts the burden on the responding firm to prove that they have not committed trafficking or any other violation. To the contrary, it is the burden of FNS in the first instance to prove conduct meeting the definition of trafficking. Then the burden shifts to the responding firm to present evidence either that the conduct does not constitute trafficking or that CMPs should

be imposed. Appellant cites *Wehab v. Yeutter* (1990) and *Celotex Corp. v. Catrett* (1986) in support. Unlike other firms, the Appellant firm was charged with trafficking based on excessive redemption rates without a single store visit or investigation, let alone a warning;

- The disqualification is arbitrary and capricious because, unlike other firms, the Appellant firm was not investigated or warned about SNAP violations prior to being charged. In *Wehab v. Yeutter* (1990), a recommendation for a three year disqualification came only after a persistent record of statistically excessive redemptions, no less than seven written and verbal complaints, nine store visits, two verbal warnings, and three written warnings. Many of the complaints involved trafficking. The Appellant firm received different treatment when it was charged with trafficking without a single investigation or store visit, much less a warning of potential violations;
- Affidavits from the owners and operators of the firm are also submitted and they are primarily responsible for processing sales transactions, including those under SNAP. Their affidavits state that they have never engaged in conduct which constitutes trafficking. The firm's recordkeeping system does not have the degree of sophistication necessary to produce records related to the transactions in the charge letter to corroborate these affidavits. The unsophisticated nature of the recordkeeping and resultant lack of available records to contest the trafficking charges should not be conclusive of a trafficking violation absent an affirmative showing by FNS that trafficking has actually occurred;
- The FOIA response consisting of the charge letter, the store visit, and the Case Analysis Document shows nothing proving that the Appellant firm engaged in trafficking. The charge letter contains nothing more than FNS's suspicions and allegations that the business engaged in trafficking and the store visit does not reference any violations of SNAP regulations;
- Even the ALERT Case Analysis Document reveals no evidence of trafficking. This document shows that the firm was flagged as having met patterns consistent with possible trafficking violations. Largely, the supporting analyses for the trafficking allegations are redacted pursuant to claimed exceptions under FOIA. Thus, it is difficult to contest the analysis or the conclusions reached thereunder;
- Ultimately, the Case Analysis concludes that there were repetitive patterns of unusual, irregular, and inexplicable SNAP activity which would warrant issuance of a trafficking charge letter. This was sufficient for FNS to effectively end the firm's decades of service to the community despite their own conclusions that there were possible trafficking violations and a likelihood that SNAP benefits were being trafficked. Appellant cited 1990 and 1986 court decisions that FNS bears the burden of proving that trafficking occurred and must show by admissible evidence that violations occurred;
- Additionally, the firm's exemplary record in SNAP encompasses decades of participation without a single warning, much less a violation or sanction. The firm has provided and continues to provide a benefit to the community. Permanent disqualification would be unfair and unjust not only for the firm, but for members of the community that rely on the benefits the firm provides as a SNAP retailer;

- The owners are well aware of the magnitude and severity of these allegations. The owners will take immediate action to remedy any conduct that could potentially be construed as violative of SNAP law or regulations. They will do this by enhancing policies and procedures consistent with applicable law and FNS guidelines for SNAP and will conduct employee training to ensure that all employees are familiar with and will abide by all applicable policies, rules, and regulations; and,
- It is Appellant's position that in light of the evidence and arguments, alternative actions other than permanent disqualification are appropriate in this case. Because FNS has not proven that trafficking occurred, the charges and disqualification are due to be overturned. The Administrative Review Officer has the regulatory authority to reverse the action under review or direct that an official warning letter be issued in lieu of disqualification. Based on the fundamental lack of evidence and in light of FNS' burden of proving that trafficking occurred, either such alternative course of action would be appropriate. If the permanent disqualification is overturned, the firm will generate policies and procedures consistent with SNAP regulations and guidelines for retailers and will conduct training for new employees and annual retraining for existing employees.

This will be no small task as the firm is a small family owned and operated business with few resources at its disposal.

Appellant submitted copies of its March 2, 2018, and March 30, 2018, submissions as well as notarized affidavits by the store owners, copies of its FOIA request, the FNS FOIA response, and the FNS FOIA response documents in support of these contentions.

## **ANALYSIS AND FINDINGS**

Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Store Background and FNS Store Visit**

FNS authorized the firm as a convenience store on March 1, 1983, and most recently reauthorized the firm on April 6, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 25, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small convenience store offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was on a counter top much covered with food and other displays leaving only a space approximately 1.0 feet wide and 1.0 foot deep for customers to place their purchases. The very small size of the checkout area would make it problematic to process large orders.
- The checkout counter had a cash register and a POS terminal as confirmed by a store employee.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale except for 12 packs of soft drinks.
- The store visit report specifically notes that the firm was not a specialty store.
- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, snacks, and other drinks) and many ineligible items.
- The firm had no fresh unprocessed meats/seafood, a very limited quantity and variety of frozen unprocessed meats, no frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, souse, two packages of hot dogs, several packages of lunch meats, and jerky), no deli meats, no sausages, no bacon, no frozen entrees, no frozen dinners, only one dozen eggs (expired), no fresh/frozen fruits or vegetables except for one apple at the checkout, a very limited selection of single serving nuts, a very limited stock of canned soups, a very limited quantity and variety of canned and packaged staple food items, only two small baking mixes, no pancake mixes, only two loaves of bread, no rolls, no tortillas, only two small packages of corn meal, only three small bags of rice, only two packages of uncooked pasta and one package of uncooked noodles, only four boxes of cold cereal and three boxes of hot cereal, only one single serving size fresh milk and one single serving milk drink, no deli cheeses, only four small packages of cheese, only three packages of butter/margarine, no yogurt, no sour cream, no baby foods or infant formula, no coffee, no tea, no cocoa, and almost no expensive eligible food items.
- Ineligible items included: tobacco, alcohol, household products, paper products, auto products, pet products, health and beauty items, clothing, incense, and arcade style video games while accessory foods included: candy, condiments, spices, snacks, cooking oil, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open noon-11:00 PM Monday-Saturday and 1:00 PM- 8:00 PM Sunday as confirmed by a store employee during the store visit.

- Many food items were priced with visible staple food prices ending in .x9 cents. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the three most expensive items costing more than \$5.00 for sale in the store as being a two pound bag of frozen shrimp priced at \$9.99, various frozen cuts of beef priced at \$8.49 per pound, and various 12 packs of soft drinks priced at \$5.99; there was not a fourth item priced over \$5.00. This listing of the most expensive items was provided by a store employee during the store visit.
- The store was a not a WIC vendor.
- The store visit photographs showed many empty or marginally stocked shelves, display racks, coolers, and freezers and many of the canned goods were dusty indicating a slow turnover of stock. One of the photographs also shows two frozen T-bone steaks both with a sell by date of October 26, 2017, a month before the store visit and a single carton of eggs with a best by date of September 28, 2017, nearly two months before the store visit. A review of photographs from the August 15, 2016, FNS store visit shows what appears to be many of the exact same staple food items shown in the November 25, 2017, store visit photographs further indicating a slow turnover of stock.

### **Multiple transactions in unusually short time frames**

This Attachment documents 19 individual transactions in nine sets of two or more transactions conducted by three different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set was comprised of three individual transactions while the remaining eight sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant offers no explanation for either the number of multiple transactions occurring within a short period of time such as the three even dollar transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) by the same household occurring within a span of seven hours and totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the high dollar value of the individual transactions such as 14 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

It is further noted that in the Retailer Operations Division's analysis of recipient shopping patterns, the household cited above with the three high dollar value transactions transacted more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the nearby super store less than one hour from the first

of the three transactions at the Appellant firm. This analysis also shows that both of the households responsible for the multiple transaction sets in this Attachment frequently shopped at a super store, supermarket, large grocery store, or medium grocery store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of conducting high dollar value transactions at Appellant's poorly stocked convenience store. Overall, 32 of the households listed in the two charge letter Attachments shopped at a super store or a supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at the Appellant firm. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is an indication of potential trafficking when transactions occur outside of a store's reported business hours. No explanation for these unusual and suspicious patterns was offered by Appellant.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as all nine transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in seven of the nine sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The inventory report and photographs from the FNS store visit show the Appellant firm offers an extremely limited stock of staple foods. Additionally, the firm was noted as carrying few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The store visit report also specifically notes that Appellant's pricing structure has food prices ending in .x9 cents. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same dollar amount of .00 cents as multiples of nine seldom have a value ending in this amount making it statistically impossible that this many store transactions would end in this amount with legitimate food purchases.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.



## High Dollar Value Transactions

This Attachment lists 111 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These include 38 transactions ending in .00 cents that are not supported by the store's pricing structure. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a convenience store offering an extremely limited stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$7.61 for this store type in Autauga County. The 111 excessively large SNAP EBT transactions at Appellant's firm for the review months represents 71.28 percent of all SNAP redemptions at Appellant's firm during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a significant distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Autauga County convenience stores during the review months and at the Appellant firm is significant. **5 U.S.C. § 552 (b)(7)(E)**. A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant again offers no evidence or rationales to support the legitimacy of the transactions in this Attachment.

While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when households have better alternatives. FNS records show there is a super store, supermarket, and a medium grocery store located within 1.54 miles of Appellant's location that offer greater quantities and varieties of staple food items at lower prices than would be found at an extremely minimally stocked convenience store. Additionally, there is another convenience store located

just 0.68 miles away from the Appellant firm that is frequented by the same households. This store is larger and stocks a significantly greater quantity and variety of both staple foods and accessory foods compared to what is available at the Appellant firm.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on November 25, 2017, shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and ineligible items. Much of the inventory for sale consists of inexpensive snacks, beverages, and single serving foods as well as ineligible items. Since the Appellant firm offers no fresh unprocessed meats/seafood, a very limited quantity and variety of frozen unprocessed meats, no frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, souse, two packages of hot dogs, several packages of lunch meats, and jerky), no deli meats, no sausages, no bacon, no frozen entrees, no frozen dinners, only one dozen eggs (expired), no fresh/frozen fruits or vegetables except for one apple at the checkout, a very limited selection of single serving nuts, a very limited stock of canned soups, a very limited quantity and variety of canned and packaged staple food items, only two small baking mixes, no pancake mixes, only two loaves of bread, no rolls, no tortillas, only two small packages of corn meal, only three small bags of rice, only two packages of uncooked pasta and one package of uncooked noodles, only four boxes of cold cereal and three boxes of hot cereal, only one single serving size fresh milk and one single serving milk drink, no deli cheeses, only four small packages of cheese, only three packages of butter/margarine, no yogurt, no sour cream, no baby foods or infant formula, no coffee, no tea, no cocoa, and almost no expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, household products, paper products, auto products, pet products, health and beauty items, clothing, incense, and arcade style video games are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Increasing food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a convenience store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. The Appellant firm has a very small checkout area and no

shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant firm decreased following the store visit on November 25, 2017, and again following receipt of the charge letter on February 22, 2018. The volume of SNAP redemptions decreased 27.42 percent from November 2017 to December 2017 and the number of SNAP transactions decreased 25.76 percent over the same period of time while the average SNAP transaction dollar amount decreased 57.85 percent from February 2018 to March 2018. A pronounced decrease in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

### **Other Contentions**

Regarding Appellant's denial of trafficking, it is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If not demonstrated, the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. Additionally, Section 278.6(e)(1) states that firms shall be disqualified permanently if personnel of the firm have trafficked.

The owner and the firm were charged with trafficking based on a computer analysis of the store's transactions for the months of April 2017 through September 2017. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and

made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring.

With regards to the two instances of case law cited by Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the SNAP Office to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence; Appellant's case law reference is acknowledged in this context only. This said, it is noted that both referenced 1986 and 1990 case decisions were issued many years before SNAP benefits began using EBT and prior to the enactment of federal regulations addressing the use of EBT transaction data in SNAP benefit trafficking investigations.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under **an electronic benefit transfer system**" (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant firm during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the

“unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

With regards to Appellant’s contentions that the permanent disqualification is arbitrary and capricious, court decisions have stated that, “A sanction is not arbitrary and capricious if the agency properly adheres to its own regulations and guidelines in imposing a sanction.” *Castillo v. United States*, 989 F. Supp. 413, 417 (D. Conn. 1997) and also, “Whether the imposition of a penalty by the FNS was arbitrary or capricious is a matter of law appropriately determined on a motion for summary judgment. *Yafaie v. United States*, 1995 WL 422169, at \*1 (S.D.N.Y. July 18, 1995).

The Retailer Operations Division followed FNS federal regulations in determining that the Appellant firm was engaging in trafficking. Furthermore, as provided by 7 USC § 2021(b)(3)(B) and 7 CFR § 278(e)(1)(i), the FNS must permanently disqualify a store upon the “first occasion” of trafficking, thus a warning letter would not be appropriate. Only if a store qualifies for a CMP may the FNS consider an alternate penalty. Here, Appellant did not request a CMP or provide the FNS or this Administrative Review Officer with any evidence of a compliance program as set forth in 7 CFR § 278.6(i). Section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges “shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter.” This section further states that, “Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.” A review of the Retailer Operations Division’s administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures therefore there are no grounds for the March 20, 2017, determination letter to be rescinded. This disqualification is an administrative action and SNAP regulations provide for an

administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

Appellant did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the firm met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. No documentation or other evidence was received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP required by 7 CFR §278.6(i).

### **CONCLUSION**

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR

§ 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN  
Administrative Review Officer

July 25, 2018